

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

APR 25 1996

In the Matter of )  
 )  
Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace ) CC Docket No. 96-61  
 )  
Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF CONSUMER ELECTRONICS RETAILERS COALITION

John W. Pettit  
Sue W. Bladdek  
Richard J. Arsenault

DRINKER BIDDLE & REATH  
901 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 842-8800

April 25, 1996

Counsel for the Consumer Electronics  
Retailers Coalition

## TABLE OF CONTENTS

	<u>Page</u>
Summary . . . . .	ii
I. THE COMMISSION SHOULD NOT AMEND § 64.702(e) TO ALLOW NONDOMINANT INTEREXCHANGE CARRIERS TO BUNDLE CPE WITH INTERSTATE, INTEREXCHANGE SERVICES . . . . .	2
A. Introduction . . . . .	2
B. The Facts that Led to the Adoption of the Antibundling Rule Still Exist Today . . . . .	3
C. Carriers Today Can Offer Service/Equipment Consistent with the Antibundling Rule . . . . .	8
D. The Commission's Proposal Conflicts with Recent Congressional Directives . . . . .	9
E. The Proposed Amendment Would Inevitably Result in Wholesale Repeal of the Antibundling Rule . . . . .	11
II. IF THE COMMISSION AMENDS § 64.702(e) IT ALSO MUST REQUIRE INTEREXCHANGE CARRIERS TO CONTINUE TO OFFER SEPARATELY, UNBUNDLED SERVICES ON A NONDISCRIMINATORY BASIS . . . . .	12
CONCLUSION . . . . .	14

## SUMMARY

The Commission should not amend § 64.702(e) to allow nondominant interexchange carriers to bundle CPE with interstate, interexchange service. Although the Commission proposes to amend the rule on the premise that it is less likely today that such carriers can engage in anticompetitive conduct with respect to bundling of CPE and services, the potential for anticompetitive conduct was not the primary reason for the Commission's adoption of the rule in 1980.

The antibundling rule was adopted primarily for two reasons: (1) to affirmatively promote competition in the CPE marketplace; and (2) to allow consumers the freedom to put together the service and equipment package most desired by them. The facts that led to the adoption of the rule for the achievement of these two goals still exist today. Indeed, since 1980, and as recently as last year, the Commission has repeatedly reaffirmed the necessity of, and the benefits of, its antibundling rule. Amending the rule as proposed will lead to a decrease in consumer satisfaction and a decrease in technological innovation.

Carriers today can create and offer packages of CPE and service consistent with the antibundling rule. The rule merely requires carriers to separately charge for each component and not to subsidize the provision of equipment from the charges for service. Thus, the only incentive for the elimination of the rule is the opportunity to subsidize

carrier-provided equipment. Such subsidization harms both consumers and independent manufacturers and retailers.

In both the Telecommunications Act of 1996 and the Cable Television and Consumer Protection and Competition Act of 1992, Congress found that subsidization of provider-affiliated CPE from service rates is contrary to the public interest. The Commission's proposal to allow such subsidization by interexchange carriers flies in the face of these recent congressional directives.

Moreover, the proposed "amendment" would inevitably result in wholesale repeal of the rule as it becomes impractical for the Commission to allow bundling with respect to interexchange services, but to prohibit it with respect to the local exchange services offered by the same carrier.

If the Commission nevertheless adopts its proposal to amend § 64.702(e), it also must require interexchange carriers to continue to offer separately, unbundled, unsubsidized services on a nondiscriminatory basis. It must also require carriers that bundle service and CPE to provide independent or unaffiliated equipment manufacturers the technical information required to manufacture equipment compatible with the service on a timely basis.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace ) CC Docket No. 96-61  
 )  
Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

To: The Commission

**COMMENTS**

The Consumer Electronics Retailers Coalition (the "Coalition"), hereby files Comments on the Commission's Notice of Proposed Rulemaking (NPRM) in the captioned proceeding.<sup>1/</sup> The members of the Coalition are major retailers of consumer electronics products in the United States, and their trade associations. They include Best Buy, Circuit City, Dayton Hudson, Montgomery Ward, Sears, Tandy, the International Mass Retailers Association, the National Association of Retail Dealers of America, and the National Retail Federation.

Each of the member companies in the Coalition sells a wide variety of equipment used in conjunction with telecommunications services, including conventional, cordless and cellular telephones, telephone accessories, facsimile machines, personal computers, and multimedia PCs equipped with modems. The Coalition has a keen interest not only in

---

<sup>1/</sup> NPRM released March 25, 1996, FCC 96-123.

continued Commission enforcement of its antibundling rule, but also in further Commission encouragement of an open market for the provision of equipment used in conjunction with existing and developing telecommunications services.

**I. THE COMMISSION SHOULD NOT AMEND § 64.702(e) TO ALLOW NONDOMINANT INTEREXCHANGE CARRIERS TO BUNDLE CPE WITH INTERSTATE, INTEREXCHANGE SERVICES**

---

**A. Introduction**

In 1980, the Commission adopted a rule prohibiting common carriers from bundling the provision of customer premises equipment ("CPE") used in conjunction with the interstate telecommunications network with the provision of common carrier communications services. See 47 C.F.R. § 64.702(e).<sup>2/</sup> The rule was adopted primarily for two reasons: (1) to affirmatively promote competition in the CPE marketplace; and (2) to allow consumers the freedom to put together the service and equipment package most desired by them. Since 1980, the Commission repeatedly has reaffirmed the wisdom of this "antibundling rule."

The Commission now proposes to amend § 64.702(e) to allow non-dominant interexchange carriers to bundle CPE with interstate transmission services. NPRM ¶ 88. The reasons

---

<sup>2/</sup> Adopted in Amendments of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384, ("Computer II Order"), modified on recon. 84 FCC 2d 50 (1980), modified on further recon. 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. United States, 461 U.S. 938 (1983).

given for this dramatic shift in direction, however, are not well founded. The facts that led to the adoption of the rule still exist today. Moreover, the proposed amendment would lessen consumer choice, impair technological innovation, harm independent manufacturers and retailers of CPE, and conflict with Congress' intent to promote a competitive CPE market. For these reasons, the Coalition opposes the Commission's proposed amendment of § 64.702(e).

**B. The Facts that Led to the Adoption of the Antibundling Rule Still Exist Today**

The Commission's proposal to eliminate the antibundling rule with respect to nondominant interexchange carriers rests primarily on the following rationale: since the 1980 adoption of the rule, the CPE market has become "fully competitive," and AT&T "no longer possesses market power in the overall interstate, domestic, interexchange market"; therefore, the Commission tentatively concludes, "it is unlikely that non-dominant interexchange carriers can engage in the type of anticompetitive conduct that led the Commission to prohibit the bundling of CPE with the provision, inter alia, of interstate, interexchange services." NPRM ¶ 88.

Such potential for anticompetitive conduct, however, was not the Commission's primary reason for adopting the antibundling rule. Thus, while one can debate the Commission's finding that the CPE market is "fully

competitive," even assuming this is true, there is still necessity for retaining the antibundling rule today.

In adopting the rule in 1980 the Commission explained that the rule would promote the Commission's objective of "assuring a viable and competitive market for terminal equipment." 77 FCC 2d at 453. Only two years ago, the Commission reaffirmed that "[t]he underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II Decisions." NYNEX Enterprise, 9 FCC Rcd 1608 (1994). The Commission explained:

The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks. These policies have also created new job opportunities in several related sectors of the economy.<sup>3/</sup>

Just last year, the FCC restated the benefits described in the NYNEX order as "indicia of the success of [the Commission's] antibundling policy." Verilink, 10 FCC Rcd 8914, 8921 (CCB 1995). That decision also reaffirmed "the Commission's longstanding commitment to the policy of

---

<sup>3/</sup> Id. Also in 1994, Congressman Edward Markey observed in a hearing before the House Committee on Telecommunications and Finance that "[u]nbundling [customer premises] equipment . . . [has] allowed for a flowering of manufacturing of telephone equipment for the home and the business. It separated product from service and fostered consumer choice and competition." Oversight Hearings on Interactive Video Systems: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, 103d Cong., 2d Sess (Feb. 1, 1994) (Statement of Representative Edward Markey).



unbundling and to the benefits produced by that policy," and declared that "any proponent seeking to modify this policy bears a heavy burden to justify the necessity for such modification." Id.

Another benefit the Commission sought in adopting its antibundling policy was increased consumer choice in telecommunications goods and services. In 1980 the Commission found bundling equipment and services a "highly questionable" practice because of its effect of restricting consumer choice:

In general, bundling of goods and services may restrict the freedom of choice of consumers and restrains their ability to engage in product substitution. Unless the goods and services in the bundle exactly match the preferences of consumers, consumer satisfaction may be reduced by bundling. Thus, consumer satisfaction could be increased by changes in the marketing structure that allow the users, rather than the vendors, to determine the bundle of goods and services that get purchased.

Computer II Order, 77 FCC 2d at 442. The Commission explained that when the variety of CPE available was limited, it was not difficult for a carrier to satisfy consumers by bundling service with equipment "that included every combination." By 1980, however, the Commission had found that:

with the range of diverse CPE options that are available from other sources, the continued provision of bundled offerings by the service vendors presents distinct potential for limiting the freedom of customers to be able to put together the service and equipment packages most desired by them.

77 FCC 2d at 443.

In 1980 no one could even have imagined the vast array of CPE options that would be available in 1996. Today it would be impossible for a carrier to put together a bundle of services and equipment that would satisfy every customer. To allow carriers to pick and choose from among this array which CPE to bundle (on discounted or "free" terms) with transmission services would inevitably result in consumers being forced to choose among packages, none of which represents their ideal. If the potential for limiting the freedom of customers to assemble their ideal package was sufficient in 1980 to persuade the Commission to adopt the antibundling rule, today that potential certainly justifies retaining the rule.

Ten years after adoption of the rule, the Commission explained, "By requiring common carriers to offer unbundled CPE and transmission services, the Commission gave customers the ability to design their own CPE and service packages to best meet their individual communications needs."

Competition in the Interstate Interexchange Market Place  
(Notice of Proposed Rulemaking), 5 FCC Rcd 2627, 2648 (1990).  
The Commission does not now explain why customers should no longer be afforded this opportunity.

Restricting consumer choice not only decreases customer satisfaction, it also leads inevitably to a decrease in technological innovation. Bundling encourages the development of equipment designed specifically for use with

one provider's service to the exclusion of other providers' services. While such equipment may utilize advanced technology, it lacks the functionality of equipment developed in a competitive marketplace and may restrict a consumer's options to take service from a variety of providers. With such equipment offered as part of the "bundle," consumers have little incentive to purchase multifunctional equipment offered by independent manufacturers and retailers.

Such was the state of the CPE market prior to the Commission's adoption of the antibundling rule in 1980. Only after the Commission established its antibundling policy did manufacturers have the confidence (and the opportunity) to invest substantial R&D capital in the development of CPE that would be compatible with the multitude of services offered over the telecommunications network. If the antibundling rule were repealed, the incentive for investment in such equipment would decrease.

It is no accident that American consumers and businesses have had access to the widest variety of affordable CPE in the world over the last decade; it is a direct result of the antibundling rule. With the antibundling rule in place, consumers have benefitted greatly by having the opportunity to select and purchase CPE separate from service in a competitive market, free of equipment subsidies.

The antibundling rule has spawned the dramatic growth in the variety of telephones (including cordless and

speakerphones), answering devices, fax machines, as well as personal computers with modems. Business and retail customers may now purchase CPE in thousands of locations throughout the nation, making their own choices among features, price, and service after the sale -- consonant with their particular requirements -- and confident that the equipment is compatible with the telephone network. The Commission should not chart a course which will result in serious impediments to the type of CPE competition that has resulted from vigorous enforcement of the antibundling rule.

**C. Carriers Today Can Offer Service/Equipment Packages Consistent with the Antibundling Rule**

The Commission also bases its proposed amendment of the antibundling rule on the principle that "allowing non-dominant interexchange carriers to bundle CPE with interstate, interexchange services would promote competition by allowing such carriers to create attractive service/equipment packages for customers." NPRM ¶ 88. The antibundling rule, however, does not preclude carriers from creating service/equipment packages. It merely requires them to separately charge for each component and not to subsidize the provision of equipment from the charges for service.

Thus, interexchange carriers today can offer "one-stop-shopping" to their customers, offering packages of services and equipment, as long as the charges for each are separately stated and the equipment is not subsidized from charges for service. In this way, carriers now may determine the types

of service/equipment packages that they believe would be appealing to many customers, and interested customers could buy both the equipment and the service from the carrier in one package. However, the customers would be able to see exactly what they are paying for the equipment. This "unbundling" requirement allows customers to choose between purchasing the entire package from the carrier or purchasing only the service from the carrier while purchasing more competitively-priced equipment or equipment with different features elsewhere.

Since carriers can now offer such packages to customers consistent with the antibundling rule, the only incentive for elimination of the rule is the opportunity to offer "discounted" or "free" equipment, which, in reality, is subsidized by higher service rates to the detriment of all consumers.

**D.    The Commission's Proposal Conflicts with Recent Congressional Directives**

The anticompetitive implications of bundling equipment and telecommunications service have been addressed by Congress twice recently. In the Cable Television and Consumer Protection and Competition Act of 1992,<sup>4/</sup> Congress directed the Commission to promulgate regulations to mitigate the harmful effects equipment bundling has on consumers of

---

<sup>4/</sup> Pub. L. No. 102-385, 106 Stat. 1491.

cable television service. For example, Section 17 of the Act directs the Commission:

(C) to promote the commercial availability, from cable operators and vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes;

(D) to require a cable operator who offers subscribers the option of renting a remote control unit --

(i) to notify subscribers that they may purchase a commercially available remote control device from any source that sells such devices rather than renting it from a cable operator; and

(ii) to specify the types of remote control units that are compatible with the converter box supplied by the cable operator.

47 U.S.C. §§ 544a(c)(2)(C) & (D). In implementing these and other provisions of the 1992 Cable Act, the Commission has ordered the unbundling of cable equipment and installation rates from service rates.<sup>5/</sup>

In the Telecommunications Act of 1996,<sup>6/</sup> Congress found it necessary to enact nearly identical antibundling provisions with respect to the multichannel video programming industry. Newly enacted Section 629(a) of the Communications Act (to be codified at 47 U.S.C. § 549) directs the Commission to adopt regulations to assure the commercial availability to consumers of equipment used to access all services offered over multichannel video programming systems from manufacturers, retailers and other vendors not

---

<sup>5/</sup> Cable Rate Regulation, 72 R.R.2d 733, 808-15 (1993).

<sup>6/</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

affiliated with any multichannel video programming distributor ("MVPD").<sup>7/</sup> While the law also allows an MVPD to provide such equipment, it requires that if the MVPD does so, the system operator's charges to consumers for the equipment must be separately stated, and that the equipment must not be subsidized by service charges.

It is ironic that the Commission proposes to repeal its antibundling rule with respect to nondominant interexchange carriers in the face of Congress' concern over the negative effects that bundling of goods and services has on the equipment marketplace, especially for those manufacturers and vendors not associated with the service providers.

**E.    The Proposed "Amendment" Would Inevitably Result In Wholesale Repeal of the Antibundling Rule**

Although the Commission proposes to "amend" § 64.702(e) by allowing nondominant interexchange carriers to bundle CPE with service, the proposal would in fact eliminate the rule with respect to interexchange service since the Commission has found that there are presently no dominant interexchange carriers. Moreover, when the BOCs begin offering interexchange service, it is unlikely that the Commission will hold them to the antibundling rule if every other interexchange carrier is permitted to bundle.

---

<sup>7/</sup> MVPDs include "a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

Under the new regulatory scheme, carriers may provide both local and interexchange service and undoubtedly will offer local and interexchange service in one package. As these services become bundled, it will be impractical for the Commission to allow carriers to bundle CPE with interexchange service, but prohibit bundling CPE with local exchange service. Inevitably, then, the Commission will "amend" the rule again to allow carriers to bundle CPE with local exchange service. Thus, the Commission's current proposal to amend § 64.702(e) will eventually result in wholesale repeal of the antibundling rule. For this reason alone, the Commission should not take the step it is proposing today.

**II. IF THE COMMISSION AMENDS § 64.702(e) IT ALSO MUST REQUIRE INTEREXCHANGE CARRIERS TO CONTINUE TO OFFER SEPARATELY, UNBUNDLED SERVICES ON A NONDISCRIMINATORY BASIS**

---

As shown above, the Coalition emphatically opposes the Commission's proposal to amend § 64.702(e). However, if the Commission amends the rule to allow nondominant interexchange carriers to bundle service and equipment, it also must require carriers offering bundled packages to continue to offer separately, unbundled, unsubsidized interstate, interexchange services on a nondiscriminatory basis. See NPRM ¶ 89.

When service and equipment are bundled, consumers are unable to ascertain the cost of the bundle's constituent elements. Without this price information, consumers cannot "cross-shop" effectively for the combination of service and



equipment that best fits their needs at the price they are willing to pay. Consumers who obtain equipment from a source other than the provider of the bundled offering, are, in effect, subsidizing those who purchase bundled service and equipment. For these reasons, should the Commission adopt its proposal to amend § 64.702(e), it must require any interexchange carrier that offers bundled packages of CPE and interexchange service:

- to separately state the charges for such CPE and service in marketing materials and bills provided to consumers; and
- to permit such service to be obtained separately at a charge which, when added to the charge for the CPE, does not exceed the amount charged for obtaining such CPE and service jointly.

Another concern must be that those who offer bundled service and CPE to the public will refuse to provide independent or unaffiliated equipment manufacturers the technical information required to manufacture equipment compatible with the service. By denying this information to unaffiliated manufacturers, those providers could preclude competition in the market for equipment competitive with that provided in the bundle.

The Commission, therefore, should require interexchange carriers that bundle CPE and service to make available to unaffiliated equipment manufacturers on a nondiscriminatory and timely basis full and complete information with respect to the protocols, technical requirements, and other

characteristics of all equipment offered to consumers by such provider as a part of, or as an adjunct to, the provider's interexchange service to the extent such information is integral to the interconnection and interoperability of such equipment with such service.

**CONCLUSION**

For the reasons stated above, the Commission should not amend § 64.702(e) of its rules to allow nondominant interexchange carriers to bundle CPE with interexchange service.

Respectfully submitted,



John W. Pettit

Sue W. Bladek

Richard J. Arsenault

DRINKER BIDDLE & REATH

Suite 900

901 15th Street, N.W.

Washington, DC 20005-2503

April 25, 1996

Counsel for the Consumer Electronics  
Retailers Coalition

**CERTIFICATE OF SERVICE**

I, Marjorie Schroeder, hereby certify that on this 25th day of April 1996, I caused a copy of the attached Comments of Consumer Electronics Retailers Coalition to be served by hand delivery to the following:

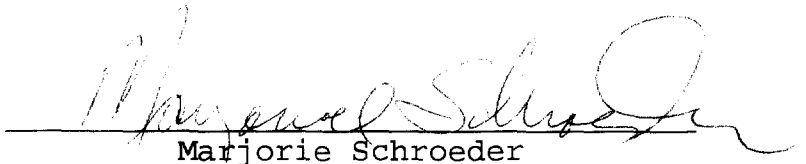
Chairman Reed E. Hundt  
Federal Communications Commission  
Room 814  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner James H. Quello  
Federal Communications Commission  
Room 802  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Susan P. Ness  
Federal Communications Commission  
Room 832  
1919 M Street, N.W.  
Washington, D.C. 20554

Commissioner Rachelle B. Chong  
Federal Communications Commission  
Room 844  
1919 M Street, N.W.  
Washington, D.C. 20554

International Transcript Service  
Room 246  
1919 M Street, N.W.  
Washington, D.C. 20554

  
Marjorie Schroeder